Comments
of

NATIONAL CONSUMER LAW CENTER
On behalf of its low income clients
and

CONSUMER FEDERATION OF AMERICA
CONSUMERS UNION
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES
U.S. PUBLIC INTEREST RESEARCH GROUP

regarding
Model Notice of Furnishing Negative Information
Docket No. R-1187

May 7, 2004

These comments on the Board's proposed model notice of furnishing negative information are submitted by the **National Consumer Law Center**[1] on behalf of its low income clients, as well as **Consumers Union,** the **Consumer Federation of America,** the **National Association of Consumer Advocates,** and the **U.S. Public Interest Research Group.**[2]

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[1]**The National Consumer Law Center** is a nonprofit organization specializing in consumer credit issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys around the country, representing low-income and elderly individuals, who request our assistance with the analysis of credit transactions to determine appropriate claims and defenses their clients might have. As a result of our daily contact with these practicing attorneys, we have seen numerous examples of invasions of privacy, embarrassment, loss of credit opportunity, employment and other harms that have hurt individual consumers as the result of violations of the Fair Credit Reporting Act. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. *Fair Credit Reporting* (5th ed. 2002) is one of eighteen practice treatises which NCLC publishes and annually supplements. These comments are written by Margot Saunders.

[2] The **Consumer Federation of America** is a non-profit association of 300 organizations that, since 1968, has sought to advance the consumer interest through research, advocacy and education.
Consumers Union, the nonprofit publisher of Consumer Reports magazine, is an organization created to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and from noncommercial contributions, grants and fees. Consumers Union's publications carry no advertising and receive no commercial support.
The **National Association of Consumer Advocates** (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students, whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers.
The **U.S. Public Interest Research Group** is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

We have three specific points regarding the proposed rule on the notice to consumers about the submission of negative information to a consumer reporting agency:

1. The notice should only be sent to consumers about whom there is negative information when the financial institution either a) intends to send it to credit bureaus or b) has actually sent it to credit bureaus.

2. The notice should use clear, unambiguous terms which are understandable by unsophisticated consumers.

3. The notice should be prominent and in bold face large type.

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1. **The notice should only be sent to consumers about whom there is negative information when the financial institution either a) intends to send it to credit bureaus or b) has sent it to credit bureaus.**

The proposed notice, which allows a financial institution to provide a notice which is not definitive, but which states that the institution "*may* provide information" which is negative, does not comply with the law's requirement. Inclusion of the term "may" is too speculative and indirect to inform any consumers about what a financial institution truly intends to do. The proposed model notice looks to be generic, and likely to be provided to *all* consumers, instead of only those who actually will have, or have had, negative information furnished about them. A notice that is provided to all consumers which blandly states that negative information *might* be furnished about them to an agency will become so ubiquitous as to be virtually useless.

The new requirement in the Fair Credit Reporting Act (FCRA) does not allow this conditional conjecture to satisfy the important goal of informing consumers that the furnisher has negative information to report. The law clearly states:

> If any financial institution that extends credit and regularly and in the ordinary course of business furnishes information to a consumer reporting agency described in section 603(p) furnishes negative information to such an agency regarding credit extended to a customer, the financial institution shall provide a notice of such furnishing of negative information, in writing, to the customer.[3]

The financial institution is only to provide the notice to consumers if and when they intend to furnish negative information in their files. Congress required furnishers to provide the notice to consumers about negative information actually possessed by the furnisher.[4] By specifying that the notice be provided to the customer who is the recipient of credit, the language

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[3] 15 U.S.C. § 1681s-2(a)(7)(A)(i).

[4] H. Rep. No. 108-263, p. 50 (Sept. 4, 2003); Statement of Rep. Hooley, H.R. 2622 Conference Rep. Cong. Rec. H12216 (Nov. 21, 2003).

indicates that the intent is not to provide general information about reporting practices broadly to an institution's customers in general. Rather, the intent is to alert a specific individual to a specific instance of negative information reporting. It is that fact – the fact that there *is* negative information about them – that consumers will want to know about, and potentially correct, if they disagree with the basis for the negative information.

The notice is intended to provide true and valuable information to consumers. Sending a combination of words to consumers which informs them that something might happen, but does not explain when it would happen, or why it would happen, or that it will definitely happen, is meaningless. The notice intended by Congress must provide *real* information. The notice proposed in the regulation does not inform consumers that any definitive event has happened or will happen. Telling consumers that something *might* happen, without informing them also of what will make that event happen, is meaningless, and could not have been the intent of Congress.

Clearly the financial services industry would prefer to be able to send a generic notice to all consumers informing them that negative information might be provided by them. This would require no actual consideration of whether they possessed negative information (which the consumer might want to dispute) or whether they intended to actually provide it to a credit reporting agency (which the consumer might want to know about, also to note the dispute). Such a generic notice would be easy and cheap for the industry, completely meaningless for consumers, and would not comply with either the intent of Congress, or the plain language of the statute.

The statutory language permitting subsequent submissions of negative information (15 U.S.C. 1681s-2(a)(7)(A)(ii) is only logically consistent if the initial notice refers to actual negative information. If the notice is permitted to be phrased as proposed, and provided at any time other than when the institution intends to report negative information, there would be no antecedent for the "additional negative information" covered by the statute.

Some might argue that the language in 15 U.S.C. § 1681s-2(a)(7)(E) would support the conjectural nature of the proposed disclosure. The language of this provision, stating that a financial institution that has provided a notice is not required to actually furnish the negative information, must be construed in the context of the entire subsection, and its purpose.

The purpose of the entire subsection was to protect consumers – to inform consumers of the fact that negative information exists, and thus to trigger a dispute and a correction if a consumer disagrees with the basis for the negative information. In the context of protecting consumers by requiring that consumers receive notice of the fact that furnishers possess negative information, it is entirely logical that Congress went further to protect consumers by ensuring that just because the financial institution possesses this information, the notice requirement does not require the institution to provide that information to the credit bureau. The consumer protection inherent in subparagraph (E) should not be twisted to support a meaningless notice about negative information.

As a result, there should be a clear, unambiguous standard underlying *when* the notice is provided. The standard should be:

> ***The financial institution should only send the notice to the consumer when there is actually negative information which can be submitted about the consumer, which they either have already submitted, or which they intend to submit.***

2. The notice should use clear, unambiguous terms which are understandable by unsophisticated consumers.

The readability of the notice is important to ensure that it informs consumers, including those consumers who may not be familiar with the terms of the financial services world, of imminent or recent negative information reporting. Using words like "insolvency," or "delinquency," will not actually explain to consumers the type of event that is negative, and would trigger negative information to the credit reporting agency.

Again the purpose of the notice is to inform consumers about the types of events which affect their ability to access affordable credit. If the notice is in legalese and conjecture, it will be useless.

The model notice must be direct and must clearly state that the furnisher "will" provide or has provided negative information. This will leave the consumer without any doubt as to actions taken by financial institutions with respect to negative information

Instead of using the words "delinquency," or "insolvency," the meaning of these words should be made clear and in simple English. All of these terms will be unfamiliar to many unsophisticated consumers and thus fail to provide the appropriate notice intended by Congress. We are aware of the statutory limit of 30 words for the notice,[5] yet the meaning of the words can be quite plain even within this limitation.

We propose that financial institutions choose between one of the following two notices (each of which is 28 words long). The choice will be only dependent upon whether the notice is sent *before* the institution has provided the information it intends to provide to the credit bureau, or *after* it has actually provided the information:

> *"We will tell credit reporting agencies about you regarding late payments, missed payments, or partial payments, other default, or bankruptcy. This will be included in your credit report."*

Or

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515 U.S.C. § 1681s-2(a)(7)(D)(i).

"We have told credit reporting agencies about you regarding late payments, missed payments, or partial payments, other default, or bankruptcy. This will be included in your credit report."

3. **The notice should be prominent and in bold face large type.**

Finally, the notice must be required to be prominently disclosed in a way that consumers will really notice it. This can be done by requiring it to be on the front page of the notice or billing statement to which it is attached, and by requiring that it be in bold face type, and that it be in a larger print then the information that it accompanies. Because there is flexibility in the delivery of the notice, consumers will not know where to look for the notice – it can be delivered with "any" materials provided to the consumer. This makes the requirement that the notice be in bold face large type especially important to ensure that it actually reaches consumers and is not overshadowed by other information from the furnisher.